No. 96-110

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF WASHINGTON, CHRISTINE O. GREGOIRE, ATTORNEY GENERAL OF WASHINGTON,

Petitioners,

—v.—

HAROLD GLUCKSBERG, M.D., ABIGAIL HALPERIN, M.D., THOMAS A. PRESTON, M.D., and PETER SHALIT, MD. PH.D.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE LEGAL CENTER FOR DEFENSE OF LIFE, INC. AND THE PRO-LIFE LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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This *amici curiae* brief respectfully is submitted on behalf of The Legal Center for Defense of Life, Inc. and The Pro-Life Legal Defense Fund, Inc. in support of Petitioners and in favor of reversal of the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 6, 1996. Pursuant to Rule 37.3 of the Rules of this Court, *Amici* have obtained and file herewith the written consent of each of the parties to the filing of this brief.

Amici submit that the inadequate historical analysis undertaken by the majority opinion in the *en banc* decision of the Court of Appeals for the Ninth Circuit requires this Court to reverse the judgment below and direct the dismissal of the underlying complaint. Any other result will further undermine the public's confidence in the ability and willingness of institutions of government, and in particular the federal Judiciary, to protect them and future generations in their "inalienable rights."

INTEREST OF THE AMICI CURIAE

The Legal Center for Defense of Life, Inc. (the "Legal Center") is a New York not-for-profit corporation which provides pro bono legal services to those engaged in the defense of the sanctity of all human life from conception to natural death. The Pro-Life Legal Defense Fund, Inc. (the "Fund") is a Massachusetts not-for-profit corporation which provides *pro bono* legal services to those engaged in the defense of the sanctity of all human life from conception to natural death. Among the clients of the Legal Center and the Fund are medical professionals who oppose the culture of death which so pervades contemporary American society.

SUMMARY OF ARGUMENT

The majority opinion below failed to follow this Court's clear mandate in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), since its meager historical analysis did not give proper weight to the relevant legal history with respect to assisted suicide in the United States. The majority also distorted its already inadequate historical analysis in an attempt to justify its unauthorized creation of a new fundamental right.[1] An

[1] A fuller version of the historical argument contained in this brief is contained in the forthcoming issue of the Harvard Journal of Law and Public Policy in an article entitled "The Use and Abuse of History in *Compassion in Dying*" by Dwight G. Duncan and Peter Lubin.

honest review of the history of assisted suicide in Western culture leads to the conclusion that no such right should be recognized.

ARGUMENT

I.

THE COURT OF APPEALS FAILED TO FOLLOW THE DIRECTIVES OF *BOWERS* V. *HARDWICK* IN FINDING A FUNDAMENTAL CONSTITUTIONAL RIGHT TO PHYSICIAN-ASSISTED SUICIDE

In *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), this Court refused to find a fundamental constitutional right to homosexual sodomy, requiring that for such rights, "which are not readily identifiable in the Constitution's text, to be found they must be "either implicit in the concept of ordered liberty so that neither liberty nor justice would exist if they were sacrificed" or "liberties that are deeply rooted in the nation's history and traditions." 478 U.S. at 191-92.[2] This Court properly identified the danger of reckless invention of new fundamental rights:

> "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930s, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those

[2] *See also Moore* v. *City of East Cleveland*, 431 U.S. 494, 503 (1977); *Palko* v. *Connecticut*, 302 U.S. 319, 325-26 (1937).

Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority." *Id.* at 194-95.

Whenever this Court has failed in this task, the cause of individual human rights has declined and public respect for the Judiciary has concomitantly diminished.[3]

The majority opinion below, while purporting to comply with the directives of this Court in *Bowers*, fails to do so in three fundamental respects. First, the discussion of history is remarkably brief, comprising only four pages of a fifty-one page opinion, 79 F.3d at 806-810, suggesting that the majority did not view this historical analysis as particularly important. Second, the court of appeals inquired not into the historical view of physician-assisted suicide—the obviously relevant area of inquiry—but rather into "Historical Attitudes toward Suicide". 79 F.3d at 806. Finally, the inquiry is at best half-hearted, since the majority apparently believed that the failure of the historical evidence to support a position is alone "not a sufficient basis for rejecting a claimed liberty interest." 79 F.3d at 805. The result is precisely the sort of judicial creation of new fundamental rights that this Court counseled against so strongly in *Bowers*. Moreover, as we discuss in Point II, the majority opinion below seriously distorts the true historical record, which unequivocally supports a continuation of the legal proscription against assisted suicide, as the dissent below points out. 79 F.3d at 850.

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[3] Without unnecessarily multiplying citations, one has only to refer to the majority opinions in the following cases: *Scott* v. *Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 191 (1856); *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130, 21 L.Ed. 442 (1873); *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162, 22 L.Ed. 627 (1875); *Plessy* v. *Ferguson*, 163 U.S. 537, 41 L.Ed. 256, 16 S.Ct. 118 (1896); *Korematsu* v. *United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

II.

THE MAJORITY OPINION DISTORTS THE HISTORICAL RECORD IN AN APPARENT ATTEMPT TO JUSTIFY ITS CREATION OF A NEW FUNDAMENTAL CONSTITUTIONAL RIGHT

Even accepting the majority's assertion that the relevant historical inquiry is the public attitude toward suicide—which is plainly not the issue at all—the court's analysis is both incomplete and inaccurate. Thus in referring to antiquity, the majority fails to mention the most relevant single piece of historical evidence—the Hippocratic Oath.

The Hippocratic Oath

Curiously, there is no mention of the Hippocratic Oath in the majority's historical analysis, and the Oath is instead discussed in another section of the opinion[4]. Yet the language of the Oath, composed in classical antiquity, clearly forbade doctors from administering lethal drugs to patients, even if requested, as it forbade their even suggesting such a course.[5] The Hippocratic Oath was administered throughout the Western world for millennia; whatever one now makes of its original formulation, as survey devoted to "historical attitudes toward suicide" cannot avoid the one piece of historical evidence which is most directly relevant to the question. It

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[4] In another section of the majority opinion, the court notes that the Hippocratic Oath, in its view, is no longer relevant, because according to the court the Oath also forbade abortion. 79 F. 3d at 829. The logic is: abortion is allowed despite the Hippocratic Oath; ergo, physician-assisted suicide should also be allowed. But this does not logically follow.

[5] OATH, 1 HIPPOCRATES 299 (1957) (W.H.S. JONES, trans.) ("I will use treatment to help the sick according to my ability and judgment, but never with a view to injury and wrong-doing. Neither will I administer a poison to anybody when asked to do so, nor will I suggest such a course.")

expressly forbids the giving of poisons to patients even when requested—a clearer rejection of physician-assisted suicide cannot be imagined. What is important is not only the Oath itself, but its wide acceptance, in so many countries, over so long a period, as the solemn accompaniment to full-fledged admission to the profession of medicine.

The undeniable relevance of the Hippocratic Oath's undertakings can be seen from the American Medical Association's Code of Ethics, as Judge Beezer notes in his dissent:

> "While not legally binding, the AMA Code of Ethics provides clear guidance on the current position of medical ethicists. Section 2.211 of the American Medical Association's Code of Medical Ethics and Current Opinions of the Council on Ethical and Judicial Affairs ('AMA Code of Ethics') prohibits physician participation in physician assisted suicide. In virtually identical language to its condemnation of euthanasia, section 2.211 provides:
>
> 'Physician assisted suicide occurs when a physician facilitates a patient's death by providing the necessary means and/or information to enable the patient to perform the life-ending act (e.g. the physician provides sleeping pills and information about the lethal dose, while aware that the patient may commit suicide). -
>
> 'It is understandable, though tragic, that some patients in extreme duress—such as those suffering from a terminal, painful, debilitating illness—may come to decide that death is preferable to life. However, *allowing physicians to participate in assisted suicide would cause more harm than good. Physician assisted suicide is fundamentally incompatible with the physician's role as healer, would be difficult or impossible to control, and would pose serious societal risks.*' (Emphasis added)"

79 F.3d at 855 (Beezer, J., dissenting).

Nor does the superficial survey of history in the majority opinion, aside form the short shrift given the Hippocratic Oath, inspire greater confidence.

Literary Suicides

In assessing the accuracy and completeness of the majority opinion's historical survey, our task is simplified by the fact that the majority relies on only a handful of secondary sources, never the original texts themselves. Indeed, fully half of the footnotes in the survey refer to a single article, Marzen, et al., *Suicide: A Constitutional Right*, 24 Duq. L. Rev. 1 (1985) (hereinafter "Marzen"). Moreover, the majority's historical "analysis" begins by confounding history and literature:

> "[I]n Greek and Roman times, far from being universally prohibited, suicide was often considered commendable in literature, mythology, and practice."

79 F.3d at 806. Hence, in this "historical" survey, the majority starts with "the first of all literary suicides," Jocasta, who, the court says, chose "an honorable way out of an insufferable situation." *Id.* at 806. As for Homer, the majority comments that he "records self-murder without comment, as something natural and heroic [and the] legends bears him out." *Id.* One legend is offered, presumably by way of example: "Aegeus threw himself into the sea—which therefore bore his name—when he mistakenly thought his son Theseus had been slain by the Minotaur." This effort is breezily done, of course—no doubts, no weighing of evidence, as this Court plainly mandates, *Bowers* v. *Hardwick*, *supra*. Yet, aside from the eponymous tale of How The Aegean Got Its Name, how many Greek myths can the majority adduce in support of the proposition that the Greeks regarded suicide tolerantly? Is it proper historical analysis to derive such a conclusion from that—or any—legend?

As for Jocasta, neither her suicide, nor that of any other literary character, whether deplorable or admirable, can be

adduced to prove anything other than what all sensible people already know—that sometimes, feeling desperate or hopeless, people will kill themselves. Jocasta and Aegeus do not exhaust the list. But it is poor scholarship to claim that Cleopatra affixing that reluctant asp to her breast, or Emma Bovary poisoning herself *en provence*, or Anna Karenina throwing herself under a St. Petersburg train, can tell us whether or not Elizabethan England, France under the Second Republic, or Czarist Russia, respectively, regarded suicide as noble or ignoble, practiced only by the very great or only by the very foolish. The majority's uses of ancient history are no more reliable.

Ancient History

One might have expected the majority opinion to have begun its survey with the Hebrews. The contribution of ancient Israel to Western civilization includes Monotheism and the moral code enshrined in the Ten Commandments. The Torah, as well as the traditions and legends of the Jewish People, have helped to form Western attitudes toward suicide. Yet, aside from one footnote of two sentences, one each for the Old[6] and the New Testaments, the majority devotes to all of ancient Israel's history, religion, and moral teachings not a paragraph, but a single sentence in another footnote: "Hundreds of Jews killed themselves at Masada in order to avoid being captured by Roman legions." *Id.* at 20 n. 24. This well-known fact, of course, tells us nothing about the accepted attitude toward suicide in ancient Israel.

In contrast, if one turns back to Marzen, the article the majority uses with such assiduity when it supports their preconceived conclusions, we find quite a different story. Marzen

[6] In that footnote, the majority states: "the stories of four suicides are noted in the Old Testament—Samson, Saul, Abimlech [*sic*], and Achitophel—and none is treated as an act worthy of censure." 79 F.3d at 808n.25.

finds in the Old Testament, and lists, not four but eight suicides, and notes that

> "with the exception of Samson, none of the eight who died by suicide are presented as heroes. . . . Only Samson's suicide was arguably heroic. . . . Since Samson does not appear directly to will his own death, but only the death of the Philistines at the cost of his own life, his intention is arguably not even suicidal."

Marzen at 19.

Marzen quotes several scholars on the subject as well. Hankoff, in *Judaic Origins of the Suicide Prohibition,* observes that "suicide was a rare phenomenon in Biblical times"; another scholar notes that "those that did commit suicide were considered deranged"; a third says that "[w]hen the act did occur, the victim and his family were punished by denial of a regular burial and the customary rituals of mourning." Marzen at 20. As time went on, Jewish writers more explicitly formulated their ideas on suicide:

> "As the influence of Hellenism spread, Jewish writers developed a more philosophic posture and became more explicit in their treatment of moral problems such as suicide. The earliest known formal prohibition of suicide among the Jews occurred in the first century A.D., when Josephus, after his army had been conquered by the Romans, forbade his soldiers to kill themselves on the grounds that suicide was a cowardly act, contrary to nature and the law of God, who committed man's soul to his body. Josephus' order contrasted with that of Eleazer Ben Jair, who successfully urged his Zealot followers to commit mass suicide at Masada in order to avoid capture by the Romans. After the exile, prohibitions of suicide were included in the Rabbinic and Talmudic writings, expressed in stories and in mourning and funeral sanctions."

Id. It is at least curious that the majority opinion sees fit to ignore all of this obviously relevant history.

Regardless of whether there are four or eight instances of suicide in the Old Testament[7], and whether, as the majority asserts, "none is treated as an act worthy of censure," there is a dramatically censured instance of assisted suicide or mercy killing—Saul, the first King of Israel, which Marzen, the majority's principal source,also recounts. Marzen at 19. As a scholar recounts it,

> "Saul was badly wounded in battle by a Philistine arrow. Afraid of being tortured and humiliated by his captors, he pleaded with his armour-bearer to kill him (I Sam 3:1-5; I Chron 10:1-4). There are two versions of what happened next. According to the first, the man refused, so Saul committed suicide by falling on his own sword (I Sam 31:5-6: I Chron 10:4). In the other account a young Amelikite came upon the wounded Saul leaning on his spear, perhaps attempting suicide. Saul begged him, Stand beside me and slay me, for anguish has seized me and yet my life lingers. So the youth obliged (2 Sam 1:6-10) in what today we would call an act of voluntary euthanasia, assisted suicide or mercy killing."[8]

This scholar concludes: "Yet the undoubted conclusion of this story is that despite being done with the best will in the world, this was none the less a wicked act, deserving the severest of punishments." *Id.* at 316. When David heard the news from the Amelikite, he "rent his garments. . . mourned and wept, and fasted" (2 Sam 1:11-12). "Then he bade one of his men go up and make an end of the Amelikite, and when the blow had

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[7] *Compare* the majority opinion, 79 F.3d at 808 n.25 *with* Judge Beezer's dissent, *id.* at 845.

[8] Anthony Fisher, Theological Aspects of Euthanasia, in Euthanasia Examined: Ethical, Clinical and Legal Perspectives (Cambridge Univ. Press 1995) at 315-16.

fallen, said over his dead body, Such is thy reward for owning thyself the murderer of an anointed king." (2 Sam 1: 15-16).

One would expect nothing less of a tradition that gave the world the Decalogue, with its categorical "Thou shalt not kill" (Exod 20: 13; Deut 5:11). According to the Anchor Bible, this commandment "is formulated in the most absolute manner, without specifying the object of the crime, in order to include any possible object, any human being (including suicide)."[9]

Of course, in the New Testament, Judas commits suicide. But he is not exactly held up as a role model, either, except in the revisionist Biblical history of Judge Reinhardt, where "the suicide of Judas Iscariot is not treated as a further sin, rather as an act of repentance." 79 F.3d at 808 n.25. This is absurd exegesis. As Raymond Brown says in his *Death of the Messiah*:

> "the Jewish attitude toward suicide as infringing on God's rights makes it extremely unlikely that Judas' hanging himself would have been considered a divinely acceptable expiation. To those who say that for various reasons it is noble to destroy oneself, Josephus (War 3.8.5) replies with indignation, "it is an act of impiety towards God who created us."[10]

The Greeks

The majority opinion's treatment of the Greeks does not inspire any greater confidence. First, Judge Reinhardt says that "in Athens, as well as the Greek colonies of Marseilles and Ceos, magistrates kept a supply of hemlock for those who wished to end their lives. The magistrates even supplies those who wished to commit suicide with the means to do so." 79 F.3d at 807. This is taken from Durkheim's *Suicide*. But

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[9] MOSHE WEINFELD, DEUTERONOMY 1-11 (1991).

[10] RAYMOND BROWN, 1 DEATH OF THE MESSIAH 644 (1991).

immediately above the passage quoted by the majority, the following appears in Durkheim:

> "Suicide was only considered illegal if it was not authorized by the state. Thus at Athens a man who had killed himself was punished with *'atimia'* [dishonor] for having committed an injustice to the city; the honors of regular burial were denied him; also his hand was cut from his body and buried separately. It was the same at Thebes with variations in detail, and also at Cyprus. The rule was so severe at Sparta that Aristodemus was punished for the way he sought and found death at the battle of Plataea."[11]

The majority's treatment of Greek philosophy is equally suspect. Judge Reinhardt gives the pre-Socratics short shrift, citing the Court's decision in *Roe* v. *Wade*:

> "In *Roe*, while surveying the attitudes of Greeks toward abortion, the Court stated that 'only the Pythagorean school of philosophers frowned on the related act of suicide,' 410 U.S. at 131, . . . ; it then noted that the Pythagorean school represented a distinctly minority view."

79 F.3d at 807.

In quoting this Court in *Roe*, the majority below passes over Plato and Aristotle. While it is natural that the discussion should turn first to Socrates, whom some consider the most famous suicide in history, it must be remembered that Socrates was under a death sentence. He took hemlock rather than flee Athens or be killed by the state. Not everyone would consider this a classic suicide; some might consider it rather enforcement of the state's punishment. It is humanly understandable that we are, in some sense, "impressed" with the

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[11] E. DURKHEIM, SUICIDE: A STUDY IN SOCIOLOGY 330 (Spaulding & Simpson, trans., 1952).

obstinate bravery and self-sacrifice of the warriors at Masada, or Socrates' willingness to die rather than be exiled, but this is very far from extrapolating, from these facts alone, societal approval of suicide. Yet this is the faulty reasoning adopted by the majority below. Moreover, Judge Reinhardt selectively uses his sources to shape history.

Thus, the majority writes that "while Socrates counseled his disciples against committing suicide, he willingly drank the hemlock as he was condemned to do, and his example inspired others to end their lives." *Id.* One is apparently expected to conclude from this that suicide met with approval in ancient Greece. The majority does nothing to dispel this impression, telling us that "Plato, Socrates' most distinguished student, believed suicide was often justifiable," citing Durkheim. Id. at 807 n.22.

But in Marzen, a source which the majority eschews here, the discussion of *Phaedo*, Plato's narrative of Socrates' last hours, comes up with quite a different conclusion:

> "Socrates compares the human relationship to the gods with that of slave to master, all humans are the possession of the gods, and none have the right themselves to dispose of their lives. Moreover, to commit suicide would provoke the anger of the gods and would thus entail consequent punishment. Even though the choice of death seems preferable to life in some cases, suicide is not morally justified. . . . In the time of Socrates, suicide is deemed immoral not simply because it violates the 'property rights' of the gods, but because it undermines the attainment of ultimate happiness."

Marzen at 22. Marzen looks elsewhere in Plato as well:

> "In the *Laws*, Plato addresses the problem of suicide in the context of the individual's relationship with the social order. His treatment of the matter there can best be understood in light of the ethics he developed in the

Republic and the *Timaeus*. In those works, Plato stressed an organic interrelationship between the individual person, the state, and the universe, morality ultimately being a matter of the human soul's disposition in the cosmic order. . . . Plato's public policy on suicide stated in the *Laws* presumes this ethical and cosmic perspective. In the *Laws* Plato observes of suicides that '*the graves of such as perish must, in the first place be solitary; they must have no companions whatsoever in the tomb. Furthermore, they must be buried ignominiously in waste and nameless spots . . . and the tomb shall be marked by neither headstone nor name.*' " (Emphasis added)

Marzen at 23 n.132. Marzen sums up that Plato

> "is concerned with suicide as a deliberate and reasoned decision, rather than as the result of passion, compulsion, or madness. In the latter cases, culpability is lacking and the fault of malice against society is not assumed; hence the state, while not condoning such action, suspends its judgment. *But when suicide is a rational and deliberate choice, it is deemed to be a flagrant act of contempt for the state and an abandonment of duty to society and the divine order.*" (Emphasis added)

Marzen at 24. This fair examination of the *Phaedo*, the *Laws*, and the ethical system developed in the *Republic* and the *Timaeus*, gives a view quite different from the desultory paragraph devoted by the majority to Plato.

If the majority's treatment of Plato can be criticized, the discussion of Aristotle can not—but only because, in what purports to be a serious review of Greco-Roman culture, Aristotle is not even mentioned! Again, had the majority consulted Marzen, their selective source of choice, they would have found a strong contradiction to the conclusions expressed in their summary. Thus, Marzen identifies Aristotle as one who unconditionally condemned suicide. Marzen

explains that Aristotle, like Plato, believed that the individual has a moral obligation to serve the society:

> "The law does not allow a man to kill himself. . . when a man voluntarily—that is, knowing who the victim and what the instrument is—injures another (not by way of retaliation) contrary to law, he is acting unjustly. But a man who cuts his throat in a fit of anger is voluntarily doing, contrary to right principle, what the law does not allow; therefore, he is acting unjustly, but towards whom? Surely not himself, but the state; because he suffers voluntarily, and nobody is voluntarily treated unjustly. It is for this reason that the state imposes a penalty, and a kind of dishonor is attached to a man who has taken his own life, on the ground that he is guilty of an offence against the state."

Marzen at 24, citing Aristotle, ETHICS, 200-01 (J. Thompson trans. 1977). In sum, as Marzen notes, suicide "as an act of cowardice, was deemed a rejection of one's personal duty, both to society and to oneself. *Id.*

No doubt the emphasis on the collective, on the duty of the individual to society, is foreign, even antipathetic to, modern ears. But if the history of Western attitudes toward suicide is to be our guide, then passing over Aristotle is exceedingly strange.

Roman Law

In discussing Rome, the majority acknowledges that "Romans did sometimes punish suicide, but notes that in the case of those accused of crime, the deceased's property would escheat to the state unless the suicide was caused by impatience of pain or sickness." 79 F.3d at 808. While this recitation does suggest an opening for what we would call physician-assisted suicide, the majority fails to note the punishment of the *Lex Cornelia* on murderers and poisoners:

> "someone is liable who kills any man. . . he is also liable who makes up [and] administers poison for the purpose of killing a man. . . . Someone is punished who makes, sells, or possesses a drug for the purpose of homicide."[12]

It certainly appears that the person who supplies the lethal drug would fall within the proscription of Roman law, regardless of how the individual suicide would be viewed. Gaius had recognized that "even medicine is poison."[13] In other words, regardless of how it treated the individual person who committed or attempted suicide, when it came to assisting suicide, Roman law came down exactly where the Hippocratic Oath did. A recent treatise on *The Criminal Law of Ancient Rome*, analyzing Roman law, concluded that while suicide itself was not generally a crime, "a mercy killing would still have counted as murder."[14]

Roman law also provided that "Guilty intention could be presumed from the deed, which need not be direct, for furnishing the cause of death was expressly provided for."[15] Justinian's *Institutes*, commenting on the *Lex Cornelia*, says, "This statute also inflicts punishment of death on poisoners, who kill men by their hateful arts of poison and magic, or who publicly sell deadly drugs."[16]

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12 DIG., 48.8.1, 3 (Marcian, Institutes 14) (Alan Watson trans. ed., Univ. of Pennsylvania Press 1985).

13 DIG., 50.16.236 (Gaius, XII Tables, 4).

14 O.F. ROBINSON, THE CRIMINAL LAW OF ANCIENT ROME 44 (1995).

15 *Id.*, citing DIG. 48.8.15, which says: "It makes no difference whether someone kills or provides the occasion of death." [*nihil interest, occidat quis ad causam mortis praebat.*]

16 JUSTINIAN INSTITUTES 4.18.

The Middle Ages

In the Christian world, at the end of antiquity, St. Augustine represented, as the dissent below notes, a clear and unambiguous voice of the tradition against self-killing, viewing it a simple application of one of the ten commandments, "Thou shalt not kill." 79 F.3d at 845 (Beezer, J. dissenting), (citing Marzen at 27). The majority "explains" Augustine's opposition as "prompted in large part by the utilitarian concern that the rage for suicide would deplete the ranks of Christians, St. Augustine argued that committing suicide was a detestable and damnable wickedness and was able to turn the tide of public opinion." 79 F.3d at 808. In fact, there is no reference made to any work of Augustine to substantiate this claim. If Augustine were such a utilitarian, and since suicide was a practice of his Donatist opponents, presumably he would not have objected to *their* use of suicide, but he clearly did object. It is therefore implausible to suggest that his opposition to suicide was prompted by utilitarian considerations.

Another example of the pseudo-scholarship indulged in by the majority opinion is the citation to St. Thomas More, described as "later canonized by the Roman Catholic Church," as "strongly support[ing] the right of the terminally ill to commit suicide and also express[ing] approval of the practice of assisting those who wished to end their lives" in his book *Utopia*.[17] While interpretation of Utopia is admittedly difficult, the Majority's source fails to note that the pro-suicide talk comes from the character Hythlodaeus, whose name literally means "speaker of nonsense," while the character named "Thomas More" strongly disagrees with those views.

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17 79 F.3d at 808, citing Thane Joseph Messinger, *A Gentle and Easy Death: From Ancient Greece to Beyond Cruzan Toward a Reasoned Legal Response to the Societal Dilemma of Euthanasia*, 71 Denv. U.L. Rev. 175, 185-88 (1993).

Professor Gerard Wegemer of the University of Dallas, author of a recent biography of More and of a study of his writings on statesmanship,[18] has informed us that to assert that Thomas More supported the rights of the terminally ill to commit suicide is equivalent to saying that Jonathan Swift in his *Modest Proposal* supported the right to kill Irish babies in order to provide food and fine gloves for English aristocrats. Both works are satires. Moreover, *Utopia* is an early work of More. At the end of his life, while awaiting his execution in the Tower of London, More wrote *A Dialogue of Comfort against Tribulation* which devotes a lengthy passage of remarkable subtlety and perception to the ways to cure a person tempted toward suicide.

The English Common Law—Bracton

While one might expect the majority opinion's scholarship to improve in considering the English Common Law, one again finds instead distortion and incompleteness of analysis. Thus, the majority's treatment of Bracton, a major figure in the development of the English Common Law, is of a piece with the slipshod character of the entire historical survey. The majority asserts that Bracton's innovation on Roman law was in the direction of injecting a greater understanding and compassion for the person who committed suicide from inability "to endure further bodily pain." 79 F.3d at 808-09. Yet the majority had earlier quoted Alvarez on Roman law itself, *i.e.*, Justinian's *Digest*, to the effect that "suicide of a private citizen was not punishable if it was caused by 'impatience of pain or sickness, or by another cause,' or by 'weariness of life. . . lunacy, or fear of dishonor.' " *Id.* at 807.

In fact, the innovation of the Common Law with respect to suicide was two-fold: (a) to punish all suicides of sane people, rather than just those of certain classes (*i.e.*, those

[18] GERARD B. WEGEMER, THOMAS MORE: A PORTRAIT IN COURAGE (1995); THOMAS MORE ON STATESMANSHIP (1996).

accused of crime, soldiers, slaves), and (b) to provide the penalty of confiscation of personal property to those suicides that were motivated by impatience of pain or weariness of life, while in the absence of such motivation the suicide's real property would be forfeit as well. It is hard to see either of these developments beyond Roman law as treating "suicides resulting from the inability to 'endure further bodily pain' with compassion and understanding." *Id.* at 809.

This distortion of Bracton illustrates the shaky foundations of the majority opinion's purported historical survey of attitudes toward suicide, which rubric it apparently borrowed from its selective source of choice, Marzen. While the majority offers three footnotes to Marzen in this section, the excerpt from Marzen on which it relies (Marzen at 57-58) is belied by the original sources. Under Roman law, as Marzen's own discussion showed, a sane suicide's property, whether personal or real, would *not* be forfeited. Only those "who have been arraigned or who have been caught red-handed, and have committed suicide from fear of the impending charge," would forfeit their personal property, as Marzen noted in the passage relied upon by the majority.[19] Moreover, as the majority and Marzen recognized, land was not generally forfeitable under Roman law. In other words, under Justinian, someone who committed suicide, not because he had been accused of crime but for a cause which included "pain of some description" or "weariness of life," would not forfeit either personal property or land. Thus Bracton's innovation makes the legal position of the ordinary suicide worse than under Roman law. The treatment of suicide under the English Common Law, as one can see in Blackstone, was to steadily become even more severe.

[19] Marzen at 57-58.

Coke and Blackstone

After Bracton, the next paragraph in the majority opinion is devoted to Sir Edward Coke, who, the opinion correctly observes, held that killing oneself was an offense and that one who committed it should forfeit his personal property. However, the majority here employs various rhetorical devices to minimize what an incautious reader could be excused for missing—the fact that in the English Common Law there was a firm prohibition on suicide by the sane. Here is how the verbal sleight of hand is performed:

> "Thus, although formally, suicide was long considered a crime under English common law, in practice it was a crime that was punished leniently, if at all, because juries frequently used their power to nullify the law."

79 F.3d at 809. Yet as Justice Scalia wrote in his concurring opinion in *Cruzan*, "the States abolished the penalties imposed by the common law . . . to spare the innocent family and not to legitimize the act." 497 U.S. at 294. This is very different from approving of suicide, and, much less, of course, physician-assisted suicide, or thinking of it as a right.

The very next paragraph of the majority opinion deploys to even greater effect the vocabulary of belittlement:

> "The traditional English experience was also shaped by the taboos that have long colored our views of suicide and perhaps still do today. English common law reflected the ancient fear that the spirit of someone who ended his own life would return to haunt the living."

79 F.3d at 809. Note the language intended to evoke a pre-rational world of credulous peasants: views are shaped by "taboos" that have "long colored our views of suicide." And we are apparently to infer that those credulous peasants have their counterparts in those benighted souls who continue to regard suicide with horror—*i.e.*, those who differ with the majority's views on physician-assisted suicide: these are the people for

whom those ancient "taboos . . . perhaps still [color their views] today." And then the majority opinion becomes positively Transylvanian:

> "Accordingly, the traditional practice was to bury the body at a crossroads—either so the suicide could not find his way home or so that the frequency of travelers would keep his spirit from rising. As added insurance, a stake was driven through the body."

Id.

The reader would presume from this sort of tone, that none of those who over so many centuries had produced so many coherent arguments against suicide had ever existed—or that they should be treated, or tainted with a guilt by verbal association, with slack-jawed rustics practicing a bit of apotropaic mumbo-jumbo. Even sticking to the English experience, it is a bizarre circumstance that at this point, where the majority cites Blackstone's *Commentaries* in a footnote, *Id.* at 809n.38. If the Ninth Circuit had bothered to look into those *Commentaries*, they would have found that Blackstone, certainly the most influential legal figure in Anglo-American law from the Revolutionary War to the Civil War, expresses no ambiguity or doubt about where the English Common Law then stood on this matter:

> "SELF-MURDER, the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure, though the attempting it seems to be countenanced by the civil law, yet was punished by the Athenian law by cutting off the hand, which committed the desperate deed. And also the law of England wisely and religiously considers, that no man hath a power to destroy life, but by commission from God, the author of it: and, as the suicide is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the

other, temporal, against the king, who hath an interest in the preservation of all his subjects; *the law has therefore ranked this among the highest crimes*, making it a peculiar species of felony, a felony committed on oneself. A felo de se therefore is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death: as if, attempting to kill another, he runs upon his antagonist's sword; or, shooting at another, the gun bursts and kills himself. The party must be of years of discretion, and in his senses, else it is no crime. But this excuse ought not to be strained to that length, to which our coroners juries are apt to carry it, viz, that the very act of suicide is an evidence of insanity; as if every man who acts contrary to reason, had no reason at all: for the same argument would prove every other criminal non compos, as well as the self-murderer. * * *

> "But now the question follows, what punishment can human laws inflict on one who has withdrawn himself from their reach? They can act only on what he has left behind him, his reputation and his fortune: on the former, by an ignominious burial in the highway, with a stake driven through his body; on the latter, by a forfeiture of all his goods and chattels to the king: hoping that his care for either his own reputation, or the welfare of his family, would be some motive to restrain him from so desperate and wicked an act. . . . And, though it must be owned that the letter of the law herein borders a little upon severity, yet it is some alleviation that the power of mitigation is left in the breast of the sovereign, who upon this (as on all other occasions) is reminded by the oath of his office to execute judgment in mercy."[20]

The above quote is given at such length, not to evoke a frisson of horror at the way suicides were once treated, but simply to show that the exemplary punishment meted out to suicides—a punishment that could be mitigated by the sovereign—reflects the English (and at that time American) Common Law's abhorrence for suicide, which is not tempered by the fact that mercy could and did mitigate the punishment. What is important is the expression of a clear disapproval of suicide, which disapproval was in no sense diminished by the feeling, which was to grow, that punishing the successful suicide was both futile and cruel. However, this judgment has absolutely nothing to do with the notion of a fundamental right to physician-assisted suicide. Nor can it be argued that Blackstone's *Commentaries* were unrepresentative, being either reactionary—*i.e.*, a statement of the law as it was, but is no longer—or revolutionary—*i.e.*, a statement not of the law as it was, but as Blackstone wished it to be in the future. The *Commentaries* were a single-handed massive compilation that became authoritative for all judges and lawyers of what the Common Law was at the time of the writing: a kind of Restatement of the Common Law at the moment that the American Republic was founded.

20 WILLIAM BLACKSTONE 4 COMMENTARIES *189-90.

The American Experience

The English philosopher whose work stands most behind the Framers of the Declaration of Independence was, as is well known, John Locke.[21] Locke's *Second Treatise of Government* is most relevant here; scholars of the Revolution generally have agreed that it is this work which influenced Jefferson the most in drafting the Declaration of Independence.[22] When Jefferson wrote that "all men . . . are endowed

21 "[T]he great virtuosi of the American Enlightenment—Franklin, Adams, Jefferson—cited the classical Enlightenment texts . . . . In pamphlet after pamphlet the American writers cited Locke on natural rights and on the social and governmental contract." BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27 (1967).

22 "That the central argument of the Declaration is based mainly upon John Locke's *Second Treatise* is indisputable." Forrest Macdonald, *Novus Ordo Seclorum* ix (1985).

by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness," we look to Locke as his source, "but Jefferson, as is well known, departed from Locke's trinity of 'life, liberty, and estate' and substituted 'the pursuit of happiness' for the third of these."[23]

To understand what Jefferson meant by inalienable rights to life and liberty, we have to look to the *Second Treatise*, where Locke, in his chapter on "The State of Nature," observes:

> "though this be a State of Liberty, yet it is not a State of License, though Man in that State have an uncontrollable Liberty, to dispose of his Person or Possessions, yet he has not liberty to destroy himself, or so much as any Creature in his Possession, but where some nobler use, than its bare Preservation calls for it. . . . Every one as he is bound to preserve himself, and not to quit his Station wilfully; so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, to preserve the rest of Mankind, and may not unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the Preservation of the Life, the Liberty, Health, Limb or Goods of another."[24]

Later in the *Second Treatise*, Locke returns to the theme that "a Man" does not have "the Power of his own Life":

> "This Freedom from Absolute, Arbitrary Power, is so necessary to, and closely joyned with a Man's Preservation, that he cannot part with it, but by what forfeits his Preservation and Life together. For a Man, not having the Power of his own Life, cannot, by Compact, or his own Consent, enslave himself to any one, nor put himself under the Absolute, Arbitrary Power of another, to take away his Life, when he pleases. No body can give

[23] *Id.*

[24] John Locke, *Two Treatises on Government*, Second Treatise, at 270-71.

> more Power than he has himself; and he that cannot take away his own Life, cannot give another Power over it."[25]

Locke's firmly repeated anti-suicide theme expressed in another way—one more familiar to Americans—is that these rights are "inalienable"—for Jefferson's formulation is an expression of the demands of Lockean natural rights. Yet none of this obviously relevant historical data—not Locke, not Jefferson, not the Declaration of Independence, and certainly not the function of the Constitution in preserving and protecting these very rights—merits even passing mention in the majority's relentless historical review. Nor does Lincoln, whose comment on *Scott* v. *Sandford*, *supra*, illustrates what happens when the Judiciary ignore the meaning of the Declaration of Independence:

> "In those days, our Declaration of Independence was held sacred by all, and thought to include all; but now . . . it is assailed, and sneered at, and construed, and hawked at, and torn, till, if its framers could rise from their graves, they could not at all recognize it . . . .
>
> "Chief Justice Taney, in his opinion in the Dred Scott case, [did] obvious violence to the plain unmistakable language of the Declaration. . . . [T]he authors of that notable instrument . . . defined with tolerable distinctness, in what respects they did consider all men created equal—equal in 'certain inalienable rights, among which are life, liberty, and the pursuit of happiness.' This they said, and this they meant. . . .
>
> "And now I appeal to all . . . are you really willing that the Declaration shall be thus frittered away?—thus left no more at most, than an interesting memorial of the

[25] *Id.*, Chapter IV, Sec. 23, at 284.

> dead past? thus shorn of its vitality, and practical value. . . ?"[26]

Lincoln's understanding of the respect owed to principles of the Declaration led him to issue the Emancipation Proclamation despite the objections of many in his Cabinet. History has already judged whether Lincoln or Taney was right.

The Several States

Turning briefly to American law, the majority opinion tells us that

> "by 1798 six of the 13 original colonies had abolished all penalties for suicide either by statute or state constitution. There is no evidence that any court ever imposed punishment for suicide or attempted suicide under common law in post-revolutionary America."

79 F.3d at 809. The question is what we are expected to make of this information, particularly in the context of the relevant historical data which the majority ignores or twists to support its preconceived outcome. Again, if the majority had chosen to utilize Marzen on this point, the outcome would be different:

> "The principal piece of evidence concerning the rationale of the colonists for their abolition of forfeiture is in a 1796 treatise by Zephaniah Swift, later Chief Justice of Connecticut, that clearly establishes that rationale.

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[26] Speech on the Dred Scott decision, Springfield, Illinois, June 26, 1857, in ABRAHAM LINCOLN, 1 SPEECHES AND WRITINGS 396-400 (Don E. Fehrenbacher, ed., Library of America 1989). Contrast Lincoln's insistence on equality in the inalienable right to life with the majority opinion's remark that "even though the protection of life is one of the state's most important functions, the state's interest is dramatically diminished if the person it seeks to protect is terminally ill or permanently comatose and has expressed a wish that he be permitted to die. . . . When patients are no longer able to pursue liberty or happiness and do not wish to pursue life, the state's interest in forcing them to remain alive is clearly less compelling." 79 F.3d at 820.

> 'There can be no act more contemptible, than to attempt to punish an offender for a crime, by exercising a mean act of revenge upon lifeless clay, that is insensible of the punishment. There can be no greater cruelty, than the inflicting of punishment, as the forfeiture of goods, which must fall solely on the innocent offspring of the offender. This odious practice has been attempted to be justified upon the principle, that such forfeiture will tend to deter mankind from the commission of such crimes, from a regard for their families. But it is evident that where a person is so destitute of affection for his family, and regardless of the pleasures of life, as to wish to put an end to his existence, that he will not be deterred by a consideration of their future subsistence. Indeed, this crime is so abhorrent to the feelings of mankind, and that strong love of life which is implanted in the human heart, that it cannot be so frequently committed, as to become dangerous to society. There can of course be no necessity of any punishment. This principle has been adopted in this state, and no instances have happened of a forfeiture of estate, and none lately of an ignominious burial.'
>
> "Swift makes clear that the traditional penalties were abolished not because suicide itself was viewed as a lesser evil or as a human right, but because the penalties punished the innocent family of the suicide, without in any way reaching the real perpetrator of the act."[27]

The majority opinion tells us that "[b]y the time the Fourteenth Amendment was adopted in 1868, suicide was generally not punishable, and in only nine of the 37 states is it clear that there were statutes prohibiting assisted suicide." 79 F.3d at ___. While the majority denigrates in a footnote what it

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[27] Marzen at 68-69, citing Zephaniah Swift, *A System of Laws of the State of Connecticut* 305 (n.p. 1795). Clearly, footnote 494 to Milsom is mistaken.

characterizes as Marzen's "extrapolating from incomplete historical evidence and drawing inferences from states' treatment of suicide and later historical evidence" to hypothesize a contrary conclusion, *id.* at 809, reference to Marzen presents a very different picture:

> "When the fourteenth amendment was ratified in 1868, nine of the thirty-seven states had statutes that prohibited assisting suicide. Of these, all but one state's legislature voted to ratify; Mississippi did not vote. In addition, Massachusetts, which voted to ratify, had case law to the same effect, and since South Carolina (which voted to ratify) had a statute condemning suicide as a felony while retaining the common law of crimes, it may be presumed that that state also criminalized assisting suicide. Under the same principles of imputation employed with regard to the ninth amendment, ten additional states (Alabama, Connecticut, Georgia, Kentucky, Maryland, Michigan, North Carolina, Pennsylvania, Tennessee, and Virginia) can be held to have prohibited assisting suicide under the common law of crimes. Of these, all but two voted to ratify; the legislatures of Kentucky and Maryland voted against the fourteenth amendment.
>
> "Of four states that ratified the fourteenth amendment (Nevada, New Hampshire, Rhode Island and West Virginia), and one that voted against ratification (Delaware), it can be said with confidence that although these states recognized the common law of crimes, there is insufficient evidence, apart from that, to establish their positions on attempting suicide or assisting suicide. Vermont, which voted to ratify, and California, which did not vote, applied the common law, but it is unclear whether they included the common law of crimes.
>
> "Illinois, Indiana, Iowa, Louisiana, Maine, Nebraska, and Texas, which voted to ratify, and Ohio, which voted against ratification, had no prohibition on assisting suicide. The status of New Jersey is unclear. Of the ten existing territories, Washington prohibited assisting suicide by statute; Colorado, the District of Columbia, Idaho and Wyoming recognized the common law of crimes, but, again, there is insufficient evidence to establish their position on assisting suicide; Arizona and Utah applied the common law, but it is unclear whether they included the common law of crimes; New Mexico and North Dakota had no prohibition on assisting suicide; and the status of Montana is unclear.
>
> "In short, twenty-one of the thirty-seven states, and eighteen of the thirty ratifying states prohibited assisting suicide. Only eight of the states, and seven of the ratifying states, definitely did not."[28]

We leave it for this Court to judge whether the majority's derogatory characterization of Marzen's scholarship withstands analysis.

In the majority's entire historical survey, only one State law case is actually discussed, and that in the last paragraph:

> "The New Jersey Supreme Court declared in 1901 that since suicide was not punishable it should not be considered a crime. '[A]ll will admit that in some cases it is ethically defensible,' the court said, as when a woman kills herself to escape being raped or 'when a man curtails weeks or months of agony of an incurable disease"

79 F.3d at 809-10, citing *Campbell* v. *Supreme Conclave Improved Order Heptasophs*, 66 N.J.L. 274, 49 A. 550 (1901). However, once again the majority opinion's actual source, reveals a quite different slant to the same information. Thus, Marzen introduces his discussion of *Campbell* as follows:

> "Perhaps a better candidate for [the] title of 'Aberrant Jurisdiction' (though the jurisdiction quickly repudiated it), would be New Jersey. In a 1901 insurance case,

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[28] Marzen at 76-76.

> *Campbell v. Supreme Conclave Improved Order Heptasophs*, nine of the seventeen members of the state's highest court joined in an opinion by Justice Gilbert Collins stating that since suicide was not punished with forfeiture, it was not a crime. * * *
>
> "It is, however, the only pre-1980 case we have found that articulates such a view. It is isolated not only in contrast to cases in other jurisdictions, but within New Jersey as well. Two years later, an inferior appellate court took the extraordinary step not only of criticizing the Justice Collins' opinion but also rendering a holding directly contrary to its language, which it characterized as dictum."[29]

Burke Balch, one of the co-authors of the Marzen article, noted recently, as had the original article, that "[i]ndeed, in 1922, New Jersey's highest court wrote, 'So strong is this concern of the state [in the preservation of the life of each of its citizens] that it does not even permit a man to take his own life."[30]

CONCLUSION

In addition to all of the other grounds urged by Petitioners and other *Amici*, we respectfully submit that the inaccurate and at times even dishonest use of history in the majority decision requires that this Court reverse the judgment below and dismiss the underlying complaint on the basis of the reasoning of the dissent below.

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[29] Marzen at 84, citing *State* v. *Carney*, 69 N.J.L. 478, 55 A. 44 (Sup. Ct. 1903).

[30] Burke Balch, *Court Suicide Decision Distorts American History*, NAT'L RIGHT TO LIFE NEWS, May 7, 1996, at 22. The case is *State* v. *Ehlers*, 98 N.J.L. 236, 241, 119 A.15, 17 (1922).

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